16-2200 (L)
16-2705 (XAP)

United States Court of Appeals
For the
Second Circuit

NATIONAL LABOR RELATIONS BOARD
Petitioner/Cross-Respondent,

vs.

ACE MASONRY INC., d/b/a ACE UNLIMITED, and BELLA MASONRY, LLC, a single member employer And alter egos, and LISA BELLAVIGNA, ROBERT BELLAVIGNA, and HENRY BELLAVIGNA, DOMENICK BELLAVIGNA and BELLA FURNITURE SOLUTIONS, INC
Respondents/Cross-Petitioner.

PETITION TO REVIEW A MAY 3, 2016, FINAL ORDER OF THE NATIONAL LABOR RELATION BOARD IN BOARD CASE NOS. 03-CA-0753540, 03-CA-0753549, 03-CA-074523, 03-CA-074531 and 03-CA-079606 as reported at 363 NLRB No. 181

FINAL FORM BRIEF OF RESPONDENTS/CROSS-PETITIONER
ACE MASONRY INC., d/b/a ACE UNLIMITED, and BELLA MASONRY, LLC, a single employer And alter egos, and LISA BELLAVIGNA, ROBERT BELLAVIGNA, and HENRY BELLAVIGNA, DOMENICK BELLAVIGNA and BELLA FURNITURE SOLUTIONS, INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, Respondent-Appellants, Ace Masonry Inc., d/b/a Ace Unlimited and Bella Masonry, LLC states as follows:

1. Ace Masonry Inc., d/b/a Ace Unlimited has no parent corporation and there is no publicly held corporation owning 10% or more of Ace Masonry Inc., d/b/a Ace Unlimited's stocks.

2. Bella Masonry, LLC has no parent corporation and there is no Publicly held corporation owning 10% or more of Bella Masonry, LLC.

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PRELIMINARY STATEMENT

The National Labor Relations Board ("NLRB") has asserted claims against ACE Masonry, Inc. D/B/A ACE Unlimited ("ACE"), Bella Masonry, LLC ("Bella"), Furniture Solutions Inc. ("Furniture Solutions"), Henry Bellavigna ("Henry"), Lisa Bellavigna ("Lisa"), Robert P. Bellavigna ("Bob"), and Domenick Bellavigna ("Domenick") (collectively "Respondents") seeking, among other things, personal liability for the back pay and fund contributions. A hearing was held before the Honorable Raymond Green, who issued a Decision and Order finding Robert Bellavigna to be personally liable for the backpay and fund contributions, but finding that Petitioner failed to show that Domenick Bellavigna did not provide fair services in exchange for the money he received and thus no personal liability for Domenick Bellavigna. (SA-49).

In a May 3, 2016 decision, the Board affirmed Judge Green's finding that Robert Bellavigna should be personally liable and modified the finding regarding Domenick Bellavigna. (SA-63). The Board applied a constructive conveyance theory of actual fraud to shift the burden of proof to Domenick Bellavigna and found Domenick failed to prove he provided services. (SA-63).

The General Counsel carries an "affirmative burden of proof and must show by a preponderance of the affirmative evidence on the record as a whole, that the allegations of the complaint are in truth supported." Shellmaker, Inc., 265 N.L.R.B. 749, 754 (1982). For the reasons shown below, the Petitioner failed to meet its burden of proof with regards to Robert Bellavigna, Domenick Bellavigna and Bella Furniture Inc. Furthermore, the Board violated the due process rights of Domenick Bellavigna and Bella Furniture Inc. when it found them personally liable under a new legal theory not propounded or litigated below.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the appeal pursuant to 29 U.S.C. § 160(f) (Section 10(f) of the National Labor Act, as amended) because it arises from a May 3, 2016 Final Order of the National Labors Relation Board in Board Case Nos. 03-CA-0753540, 03-CA-0753549, 30-CA-074523, 03-CA-074531 and 03-CA-079606 as reported at 363 NLRB No. 181. Respondents-Appellants timely filed a petition for review on August 3, 2016.

Venue is properly before the Second Circuit Court of Appeals because the unfair labor practice in question is alleged to have occurred in the State of New York.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Board, violate Domenick Bellavigna and Bella Furniture Solution Inc.'s due process rights by applying a theory of actual fraud, which theory was never litigated or argued below by General Counsel and thus without notice shifting the burden of proof from the Board to Domenick Bellavigna and Bella Furniture?

Answer: YES

2. Does substantial evidence support the finding that Robert Bellavigna had an active and controlling role in Ace Masonry and Bella Masonry LLC and therefore should be held individually, jointly and severally liable for Respondent's Ace Masonry's remedial obligations by piercing the corporate veil?

Answer: NO

3. Did the Board incorrectly interpret New York State Lien Law Section 70 and 71 and misapply it to this case?

Answer: YES

STATEMENT OF THE CASE

This a petition by respondents for judicial review by this Court of the Second Supplemental Decision and Order of the National Labor Relations Board issued on May 3, 2016 and reported at 363 NLRB No. 181 against Respondent Ace Masonry, Inc., doing business as Ace Unlimited, of Ithaca, New York, and Respondent Bella Masonry, LLC, of Burdette, New York, a single employer and alter egos, and Respondents Lisa Bellavigna, Robert Bellavigna, and Henry Bellavigna, individuals, their officers, agents, successors, and assigns, and Respondents Domenick Bellavigna and Bella Furniture Solutions, Inc., of Greenville, Florida. (SA-63). The underlying action was brought for unfair labor acts by Bella Masonry LLC and Ace Masonry Inc., and the determination of liability among respondents.

On January 23, 2013, the Board issued an unpublished Decision and Order adopting the December 12, 2012, decision and recommended order of an administrative law judge finding that Ace Masonry, Inc., doing business as Ace Unlimited, and Bella Masonry, LLC, who the Board determined had been alter egos since September 21, 2011, violated Section 8(a)(1) and (5) of the National Labor Relations Act ("the Act"), 29 U.S.C. §§ 151, 158(a)(1) and (5). Bella Masonry violated the Act by failing and refusing to apply the terms of collective-bargaining agreements that Ace Masonry had entered

into with the International Union of Bricklayers and Allied Craftworkers, Local No 3 ("Bricklayers"), Laborers International Union, Local No. 785 ("Laborers"), and Northeast Regional Council of Carpenters ("Carpenters") (collectively "the Unions"), and by failing and refusing to bargain collectively with the Unions. The Board also found that Ace Masonry and Bella Masonry violated the Act by failing and refusing to provide the Bricklayers and Laborers with requested information.

To remedy these violations, the Board ordered Ace Masonry and Bella Masonry to make employees whole for any earnings or other benefits lost because of the failure to apply the terms of the collective-bargaining agreements, and to make contributions to union benefit funds provided for in those agreements and to reimburse those funds for contributions that Ace Masonry and Bella Masonry failed to make on behalf of their employees. The Board also ordered them to provide the requested information and mail remedial notices to former employees. The Second Circuit enforced the Board's Order in an unpublished decision issued in NLRB v. Ace Unlimited & Bella Masonry, LLC, Case No. 13-585 (SA-33).

After a controversy arose over the amount of backpay and benefit-fund contributions due under the Board's court-enforced Order, the General Counsel issued a compliance specification, initiating a compliance

proceeding, which is designed to ensure a respondent's compliance with a Board order, and includes matters such as liquidating any amount due. On January 31, 2014, the Board issued a Decision and Supplemental Order (SA-39), granting partial summary judgment on some of the allegations in the compliance specification, and remanded the case to the Board's Regional Director for Region 3 so that a hearing could be held on unresolved allegations, including the liquidated amounts due to unit employees and the Unions' benefit funds, and the allocation of liability among the Respondents.

On November 25, 2014, Administrative Law Judge Raymond P. Green issued a supplemental decision. (SA-49). Respondents and General Counsel each filed exceptions and a supporting brief and General Counsel filed an answering brief. Respondents filed exceptions to the judge's findings of fact and personal liability of Robert Bellavigna and the finding by ALJ Green that New York Lien Law trust funds could be used to pay for the debts at issue. General Counsel filed exceptions with regard to the finding that Bella Furniture and Domenick Bellavigna was only a passive recipient of funds and thus not liable for the amount of Bella Masonry assets that Henry Bellavigna conveyed to him.

The National Labor Relations Board issued a second supplemental decision and order on May 3, 2016, reported at 363 NLRB No. 181,

affirming the ALJ'S rulings, findings and conclusions except as modified with regard to Bella Furniture Solutions Inc. and Domenick Bellavigna. (SA-63). The Board adopted ALJ Green's findings that it was appropriate to pierce the corporate veil, that Robert Bellavigna played an active role in Ace Masonry's operation and underlying misconduct and thus was individually, jointly and severally liable for the remedial payments at issue. The Board also adopted the findings by ALJ Green that New York State's Lien Law did not permit Lisa Bellavigna to shield the funds from being recovered by the Unions. Lastly, the Board modified ALJ Green's findings with regard to Domenick Bellavigna and Bella Furniture Solutions Inc. by applying a theory of actual fraud, which theory was never litigated or argued below by General Counsel. Under this actual fraud theory, the Board modified ALJ Green's findings and found Bella Furniture Solutions Inc. and Domenick Bellavigna jointly liable for the amount of Bella Masonry's assets that Henry Bellavigna conveyed to them. (SA-63).

STATEMENT OF RELEVANT FACTS

A. Robert Bellavigna

Lisa was the sole owner when ACE was created and then again after 2008.[1] (A-31, A-32, A-34). Lisa executed all the contracts on behalf of

[1] David Traver was a partial owner of ACE from 2004 until 2008.

ACE, including the collective bargaining agreements, and she executed all the change orders for all of ACE's projects. (A-34, A-109). Lisa was solely responsible for performing the banking, lending and obtaining insurances and bonding for ACE. (A-34, A-109). Lisa was also the one solely responsible for interacting with ACE's accountants. Similarly, Lisa was the primary figure responsible for payroll, bookkeeping, as well as billing. (A-34, A-109). Bob had no role in any of the above activities as they related to ACE.

Bob did not exercise any control over Bella's financial arrangements. (A-415-A-416). Similarly, Bob did not regularly exercise control over Ace's financial arrangements. There were only two instances where Bob had any involvement with Ace's financial matters. Bob had to personally guaranty a loan to Ace. (A-113-A-116, A-117). However, as explained by Mr. Steve Bacon in 2012 the bank required that Lisa personally guaranty the loan to Ace. Since Lisa's assets were held jointly with Bob as her husband, it was the bank's policy to have the spouse also personally guaranty the loan. (A-114).

The only other instance where Bob was involved with Ace's financial matters was in the fall of 2011. (A-114). During that time Lisa became ill and was unable to attend to the daily requirements of the company. As a

result, several people were forced to pick up the slack and take on extra duties. (A-114-A-116). Bob, for a brief period of time, worked with Ace's controller to make sure suppliers and subcontractors were paid. (A-114-A-116). Once Lisa returned, Bob no longer had any role with Ace's finances or debts.

The bank seized Ace's assets and sold them. Bob did not receive or purchase any of Ace's assets. (A-130). There is no proof that Bob received any loans from Ace or Bella. (A-200-A-201, A-204). There is no proof that Bob had any role whatsoever in controlling Bella's assets or finances. Instead, Henry fulfilled those obligations. That is, Henry was the sole owner and manager of Bella. (A-130). Henry was the person that negotiated contracts, executed contracts, change orders and submittals, handled the banking and was in charge of hiring and firing people. (A-130).

B. Domenick Bellavigna and Bella Furniture:

Bella Furniture Inc., a Florida Corporation, was hired to produce a website and marketing brochures. Domenick Bellavigna is the owner of Bella Furniture Inc. (A-372). Bella Furniture Inc. designed and created Bella Masonry's website. (A-374-A-377 & Ex-539). Domenick Bellavigna interacted with Bella Masonry's employee Melissa Blanchard to make sure the website was up and running. (BSA-1-BSA-5). Domenick Bellavigna, as

owner of Bella Furniture Inc., also designed and created a tri-fold. (A-381-A-393 & Ex-487). Bella Furniture then invoiced Bella Masonry for the work. (Ex-538). Eventually Bella Furniture was paid for it services.

The General Counsel contends that the amount paid was excessive and argued that Bella Furniture and Domenick Bellavigna should be personally liable for the amount of money paid to him under White Oak Coal. 318 NLRB 732 (1995). However, the General Counsel offered no expert testimony or proof of the going rate for such services in that location at the time the services were rendered and failed to prove the amount paid was excessive.

C. Article 3-A of the Lien Law and Lisa Bellavigna:

Ace received a check from Ithaca College. The check was deposited and then withdrawn over a period of days. Lisa testified that she withdrew the funds because they were trust funds and she needed to protect them for the benefit of the trust beneficiaries (A-41, A-43-A-45, A-46-A-56, A-702-A-703). Lisa identified at least one trust beneficiary, E.I. Johnson and testified that Ace owed that trust beneficiary at least $150,000.00. (A-702-A-703). So in an attempt to protect the trust beneficiary, Lisa withdrew the money from the account.

SUMMARY OF ARGUMENT

As shown in point I below, the Board violated the due process rights of Domenick Bellavigna and Bella Furniture Inc. by finding them personally liable under a theory not previously raised or litigated, therefore giving Domenick Bellavigna and Bella Furniture Inc., no notice that they would have the burden of proof instead of the petitioner.

Administrative Judge Raymond Greene pierced the corporate veil of Ace Masonry, Inc and found Robert Bellavigna personally liable for the obligations of Ace Masonry, Inc. The Judge found Robert Bellavigna participated in a scheme to defraud the Unions and creditors of Ace Masonry. (SA-49). The Board upheld Judge Raymond's decision with regards to Robert Bellavigna. (SA-63) However, as shown in point II below, the evidence presented by the petitioner failed to show that Robert Bellavigna participated in a scheme to defraud, failed to show Bob diverted funds from Ace or Bella, failed to show that Bob retained any of Ace's or Bellas' assets, failed to show that Bob had any role whatsoever in controlling Bella Masonry's assets or finances, failed to show that Bob was in control of Ace Masonry. The Board failed to prove by substantial evidence that Robert Bellavigna should be held personally liable for the debts of Ace Masonry, Inc.

The Board misinterpreted NYS Article 3-A Lien Law. Article 3-A of the Lien Law (Lien Law §§ 70-79-a, relevant portions attached hereto) impresses with a trust any funds paid or payable to a contractor "under or in connection with a contract for an improvement of real property." Lien Law § 70(1). LeChase Data/Telecom Servs., LLC v. Goebert, 6 N.Y.3d 281, 289 (2006). The primary purpose of Article 3-A is to ensure that those who have directly expended labor and materials to improve real property at the direction of an owner or a general contractor receive payment for the work actually performed. Aspro Mech. Contr. v. Fleet Bank, 1 N.Y.3d 324, 328, (2004). Ace Masonry received $150,000.00 from Ithaca College. Lisa withdrew these funds so as to protect them, from garnishment, for the benefit of the trust beneficiaries.

ARGUMENT

POINT I

THE BOARD VIOLATED BELLA FURNITURE AND DOMENICK BELLAVIGNA'S DUE PROCESS RIGHTS BY APPLYING A THEORY OF LAW NOT RAISED OR ARGUED BY GENERAL COUNSEL IN THE COMPLAINT OR ARGUMENT BELOW.

Whether the Board violated the due process rights of Domenick Bellavigna is a question of law. Questions of law are reviewed de novo by the courts. NLRB v. Konig, 79 F.3d 354 (3d Cir. 1996). The fundamental elements of procedural due process are notice and an opportunity to be

heard. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). Congress incorporated these notions of due process in the Administrative Procedure Act. Under the Act, "persons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted." 5 U.S.C. Section 554(b). To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. Bendix Corp. v. FTC, 450 F.2d 534, 542 (6th Cir. 1971). Additionally, "an agency may not change theories in midstream without giving respondents reasonable notice of the change." Id. (quoting Rodale Press v. FTC, 407 F.2d 1252, 1256 (D.C. Cir. 1968)). International Elec. Contrs. Of Houston Enc. v NLRB 720 F.3d 543

The NLRB is well acquainted with this requirement. In Champion International Corp., 339 N.L.R.B. 672, 673 (2003), the Board stated "[i]t is axiomatic that a respondent cannot fully and fairly litigate a matter unless it knows what the accusation is." Moreover, the Board knows that it cannot "change theories in midstream without giving respondents reasonable notice of the change." Lamar Cent. Outdoor d/b/a Lamar Adver. of Hartford, 343 N.L.R.B. 261, 265 (2004) (quoting Bendix Corp. v. FTC, 450 F.2d 534, 542 (6th Cir. 1971)). Importantly, the Board has recognized that when the

General Counsel has chosen to litigate against a respondent on a narrow theory of liability, and the respondent was reasonably led to believe that it would not have to defend on a broader theory, an ALJ is not free to resolve the case on a broader theory. In re Sierra Bullets, LLC, 340 N.L.R.B. 242, 243 (2003) (citing Paul Mueller, Co., 332 N.L.R.B. 1350 (2000)). In such a case, the proper response, according to Sierra Bullets, is to reverse the ALJ, reject the theory on a broader analysis, and dismiss the charge. Id.

The General Counsel in this case did not litigate the issue of Domenick's liability under a theory of fraudulent conveyance. In both the hearing and the post hearing brief General Counsel chose to argue that Domenick Bellavigna should be held personally liable under White Oak Coal Co. 318 NLRB 732 (1995), which sets forth the standard to be applied in determining whether the corporate veil may be pierced. This was the sole theory the General Counsel advanced. Under this theory the burden of proof to show a lack of fair consideration rests on the party challenging the conveyance. See United States v. McCombs, 30 F.3d 310, 324 (2nd Cir. 1994). In this case, the burden of proof rested on the General Counsel to show lack of fair consideration and they failed to do so.

Therefore, the Board in review of the ALJ's decision used an alternate theory not litigated to find Domenick Bellavigna personally liable for the

$34,100 paid to Domenick Bellavigna for services rendered on behalf of Bella Masonry. The Board found Domenick Bellavigna personally liable under a fraudulent conveyance theory of actual fraud. (SA-63). This legal theory is separate and distinct from the piercing the corporate veil *White Oak* theory of liability advocated by the General Counsel. See Domsey Trading Corp. 357 NLRB 2161 (2011). Nothing in the hearing or the way the General Counsel litigated this case put Domenick Bellavigna on notice that the General Counsel was seeking in the alternative to recoup under a fraudulent conveyance theory of actual fraud, which shifts the burden of proof to Domenick Bellavigna to establish that he took payment of $34,100.00 in good faith and for a reasonably equivalent value of services rendered in exchange. Domenick Bellavigna was not reasonably placed on notice that the burden of proof had shifted to him. Therefore, as a matter of due process Domenick Bellavigna and Bella Furniture Inc. cannot be held liable for their failure to offer proof of fair consideration for the services rendered.

The fraudulent conveyance theory of actual fraud was neither alleged nor litigated and as stated in the dissenting opinion of Judge Philip Miscimarra, the Board erred in invoking it to find Domenick Bellavigna and Bella Furniture Inc. personally liable. (SA-63).

POINT II

PETITIONERS HAVE NOT ESTABLISHED THAT CORPORATE FORMALITIES WERE IGNORED AND A FRAUD WAS PERPETRATED AND THUS THERE CAN BE NO PERSONAL LIABILITY FOR ROBERT BELLAVIGNA

Factual findings are reviewed under the substantial evidence standard on the record as a whole. 29 USC §160(e) and (f). A reviewing court may set aside a Board decision "when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view" Universal Camera v. NLRB 340 U.S. 474,488 (1951). The reviewing court is not bound by the Board's rejection of an ALJ's finding, but may consider the ALJ's decision.

The NLRB argues that the Court should pierce the corporate veil and hold Bob personally liable for the debts of Ace. The corporate veil will be pierced only where it is employed to perpetrate fraud. Isaac Schieber, et al., individually, and *Allen Hat Co.*, 26 NLRB 937, 964 (1940), enfd. 116 F.2d 281 (C.A. 8 1940). "The insulation of a stockholder from the debts and obligations of his corporation is the norm, not the exception." NLRB v. Deena Artware, Inc., 361 U.S. 398, 402-403.

The test for imposing personal liability on a corporate owner/officer is set forth in White Oak Coal 318 NLRB 732 (1995). Under White Oak Coal

the Board will pierce the corporate veil and hold an individual personally liable when 1) there is such unity of interest and lack of respect given to the separate identity of the corporation by its shareholders, that the personalities and assets of the corporation and the individual are indistinct and 2) adherence to the corporate form would sanction a fraud, promote injustice or lead to an evasion of legal obligations.

Under the first prong of the White Oak Coal test the factors to be considered are the degree to which corporate legal formalities were maintained and the degree to which individual and corporate funds, other assets and affairs were commingled. White Oak Coal at 735. An individual shareholder's participation in a corporation's unfair labor practice as an officer or employee of the corporation is not sufficient to pierce the corporate veil if the individual was acting through the proper corporate form and was respecting the separate corporate identity. Esmark, 887 F.2d at 757; NLRB v. Greater Kansas City Roofing, 2 F.3d 1047 (10th Cir. 11983). (Court held that NLRB erroneously pierced the corporate veil in the absence of evidence and a finding that the controlling shareholder used the corporate structure to promote fraud or that her disregard of the independent corporate existence of company led to injustice or an evasion of legal obligations.)

Among the specific factors considered by the court in determining whether the corporation and its stockholders have maintained their separate identities are: (1) whether a corporation is operated as a separate entity; (2) commingling of funds and other assets; (3) failure to maintain adequate corporate records or minutes; (4) the nature of the corporation's ownership and control; (5) absence of corporate assets and undercapitalization; (6) use of a corporation as a mere shell, instrumentality or conduit of an individual or another corporation; (7) disregard of legal formalities and the failure to maintain an arms-length relationship among related entities; and (8) diversion of the corporation's funds or assets to noncorporate uses. NLRB v. Greater Kansas City Roofing, 2 F.3d 1047 (10th Cir. 11983); White Oak Coal 318 NLRB 732.

Under the second prong the Court must determine whether adhering to the corporate form and not holding the individuals liable would permit a fraud. The showing of inequity necessary to satisfy the second prong must flow from the misuse of the corporate form. The mere fact that a corporation commits an unfair labor practice, breaches a contract, or commits a tort does not mean that the individual shareholders of the corporation should personally be liable. Scarbrough v. Perez, 870 F.2d 1079, 1084 (6th Cir. 1989). The individual who is sought to be charged

personally with corporate liability must have shared in the moral culpability or injustice that is found to satisfy the second prong of the test. Furthermore, in most cases the fact that a corporation is incapable of paying all its debts is insufficient for a finding of injustice. Scarbrough, 870 F.2d at1084 (6th Cir. 1989); Seymour v. Hull & Moreland Eng'g 605 F.2d 1105, 1113 (9th Cir. 1979); Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan v. Hroch, 757 F.2d 184, 191 (8th Cir. 1985).

In this case Bob was not an owner, shareholder, officer or director. Instead, he was just an employee of Ace and then Bella. (A-506-A-571). Bob did not exercise any control over Bella's financial arrangements. (A-596-A-695). Similarly, Bob did not regularly exercise control over Ace's financial arrangements. (A-506). There were only two instances where Bob had any involvement with Ace's financial matters. Bob had to personally guaranty a loan to Ace. (A-511). However, as explained by Mr. Steve Bacon in 2012 the bank required that Lisa personally guaranty the loan to Ace. Since Lisa's assets were held jointly with Bob as her husband, it was the bank's policy to have the spouse also personally guaranty the loan. (A-113-A-116).

The only other instance where Bob was involved with Ace's financial matters was in the fall of 2011. (A-113-A-116). During that time Lisa

became ill and was unable to attend to the daily requirements of the company. As a result, several people were forced to pick up the slack and take on extra duties. (A-113-A-116). Bob, for a brief period of time, worked with Ace's controller to make sure suppliers and subcontractors were paid. (A-113-A-116). Once Lisa returned, Bob no longer had any role with Ace's finances or debts. There is no proof that Bob did anything to defraud the company or divert assets from the company or anything to evade Ace's legal obligation while Bob exercised control over Ace's finances for that brief period of time.

The plaintiffs argue that Lisa and Bob deposited money from Ace into their joint account. Lisa, like at Ace, was primarily responsible for the family banking and management of money. Lisa, not Bob, made the majority of the withdrawals and deposits into their joint bank accounts. Bob did not and does not actively control any joint bank accounts or even his own personal account. In fact, if you look at the dozens of transactions referenced by plaintiffs there are only six (6) instances where Bob's signature is on a deposit slip or check. (A-553-A-559 & Ex-1244). It can hardly be said that Bob was actively involved with any scheme to defraud plaintiffs.

A person's passive receipt of benefits that derive from a diversion of

corporate assets for non-corporate purposes does not, by itself, demonstrate participation in the fraud, injustice, or inequity sufficient to establish individual liability under the second prong of the analysis. Smith Barney, Inc. v. Strangie, 192 F.3d 192 (1st Cir. 1999) (finding wife who may have personally benefited from husband's diversion of corporate assets for non-corporate purposes not individually liable); Firstmark Capital Corp. v. Hempel Financial Corp., 859 F.2d 92, 95 (9th Cir. 1988) (finding wife who personally benefited from husband's diversion of corporate assets for non-corporate purposes not individually liable).

There is no proof that Bob diverted funds from Ace or Bella. There is no proof that Bob retained any of Ace's or Bella's assets. Bob could not retain any of Ace's assets because the bank seized Ace's assets and sold them. There is no proof that Bob received any loans from either company. There is no proof that Bob had any role whatsoever in controlling Bella's assets or finances. Instead, Henry fulfilled those obligations. That is, Henry was the sole owner and manager of Bella. (A-130). Henry was the person that negotiated contracts, executed contracts, change orders and submittals, handled the banking and was in charge of hiring and firing people. Additionally, it must be noted that for all the transactions that plaintiffs point

to regarding Bella and Henry, i.e., bank transactions and the sale of equipment, there is no evidence that Bob was involved with any of them.

The mere receipt of corporate assets does not establish that an individual participated in the abuse of the corporation. As the court explained in NLRB v. Greater Kansas City Roofing, "[A] necessary element of the [piercing-the-corporate-veil] theory is that the fraud or inequity sought to be eliminated must be that of the party against whom the doctrine is invoked, and such party must have been an actor in the course of conduct constituting the abuse of corporate privilege." 2 F.3d at 1053. For this reason, a person's passive receipt of benefits that derive from a diversion of corporate assets for non-corporate purposes does not, by itself, demonstrate participation in the fraud, injustice, or inequity sufficient to establish individual liability under the second prong of the analysis. In other words, where the individual alleged to be liable plays no active role in the corporation's operations, that individual has not effectively become the business entity simply upon receipt of funds or other corporate assets, and accordingly cannot be held liable for the corporation's obligations. As such, Bob cannot be held personally liable.

POINT III
NEW YORK STATE LIEN LAW PREVENTED LISA BELLAVIGNA FROM USING TRUST ASSESST FOR NON-TRUST PURPOSES

AND FROM USING TRUST ASSETTS FROM ONE JOB TO PAY BACK PAY TO EMPLOYEES ON ANOTHER JOB.

Whether the Board misapplied Article 3-A of the New York State Lien Law is a question of law. Questions of law are reviewed de novo by the courts. NLRB v. Konig, 79 F.3d 354 (3d Cir. 1996).

Article 3-A of the New York Lien Law (New York Lien Law §§ 70-79-a) impresses with a trust any funds paid or payable to a contractor "under or in connection with a contract for an improvement of real property." LIEN LAW § 70(1). LeChase Data/Telecom Servs., LLC v. Goebert, 6 N.Y.3d 281, 289 (2006). The primary purpose of Article 3-A is to ensure that those who have directly expended labor and materials to improve real property at the direction of an owner or a general contractor receive payment for the work actually performed. Aspro Mech. Contr. v. Fleet Bank, 1 N.Y.3d 324, 328, (2004).

Lien Law § 71(2), (4) and (5) provide that trust assets shall be held and applied for the 'cost of the improvement' i.e. payment of project claims of subcontractors, architects, engineers, surveyors, laborers and material men; that all persons who have claims for payment of trust assets are beneficiaries of the trust; and that every trust claim shall be deemed to be in existence from the time of the making of the contract or the occurrence of the transaction out of which the claim arises. Gerrity Company, Inc. v.

Bonacquisti Construction Corp., 515 N.Y.S.2d 188 (Sup. Ct. Albany Cty., 1987)(rev'd on other grounds); See also, Aspro Mech. Contr., 1 N.Y.3d at 329. The trust continues until all claims have been exhausted.

Trust assets may not be used for non-trust purposes, which is any purpose outside the scope of the cost of the improvement of real property/construction project in question. Aspro Mech. Contr., 1 N.Y.3d at 329. For example, use of trust assets to pay corporate administrative expenses/overhead or officer salaries or union benefits not related to work subject to that particular contract is not allowed since these are non-trust purposes which are not included in the Lien Law § 71(2) list of approved trust fund expenditures. Schwadron v. Freund, 329 N.Y.S.2d 945 (Sup. Ct., Rockland Cty., 1972).

Lien Law § 72(1) states "[a]ny transaction by which any trust asset is paid, transferred or applied for any purpose other than a purpose of the trust, before payment or discharge of all trust claims" is an improper and unlawful diversion of trust assets, regardless of the propriety of the trustee's intentions or whether there are trust claims in existence at the time of the transaction. LIEN LAW § 72(1); LeChase, 6 N.Y.3d at 289. In other words, unauthorized use of project trust funds is a per se illegal diversion as a matter of law. Any person knowingly involved in the diversion is liable for the diversion; there

is no need to pierce the corporate veil, the law automatically finds personal liability.

This body of law was concisely summed up by the Third Department in the Kemper Insurance case. The court stated:

> As the agreement between Haseley {the contractor} and defendant {the State of New York} was a construction contract, all funds under the contract were subject to a statutory trust imposed by *Lien Law article 3-A*, which arose automatically upon the execution of the contract (*see Lien Law § 70[4]; § 71 [5]; Matter of RLI Ins. Co., Sur. Div. v. New York State Dept. of Labor, 97 NY2d 256, 262, 766 NE2d 934, 740 NYS2d 272 [2002]; City of New York v. Cross Bay Contr. Corp., 93 NY2d 14, 19, 709 NE2d 459, 686 NYS2d 750 [1999]*). The purpose of the trust is to "safeguard the rights of those working on construction projects by providing for the payment of obligations incurred in performing the contract." (*AMG Indus. v Eckert Co., 279 AD2d 717, 719, 719 NYS2d 192 [2001]*[internal quotation marks and citation omitted]). The trust res consists not only of funds already received, but also of the right to receive funds in the future, including prospective payments that are contingent upon the trustee's future performance of its contractual obligations (*see Lien Law § 70 [1] [a]; Canron Corp. v City of New York, 89 NY2d 147, 156, 674 NE2d 1117, 652 NYS2d 211 [1996]*). Any use of the trust funds other than the payment of claims under the contract, whether or not well intended on the trustee's part, is an improper diversion of trust assets. (*see LeChase Data/Telecom Servs., LLC v Goebert, 6 NY3d 281, 289, 844 NE2d 771, 811 NYS2d 317 [2006]*). General contractors and subcontractors become trustees of any funds they

> receive under such a contract *(see Lien Law § 70 [2]; City of New York v. Cross Bay Contr. Corp., 93 NY2d at 19-20; AMG Indus. v Eckert Co., 279 AD2d at 719)*.

Kemper Ins. Companies v. State of New York, 70 A.D.3d 192, 196, (3rd Dept. 2009)(sections in {} added for clarification) A diversion of trust assets also subjects the involved parties to criminal sanctions. NY Lien Law Section 79-a.

Ace received a check from Ithaca College. The check was deposited and then withdrawn over a period of days. Lisa testified that she withdrew the funds because they were trust funds and she needed to protect them for the benefit of the trust beneficiaries (A-41, A-43, A-44-A-45, A-46-A-56, A-702-A-703). Lisa identified at least one trust beneficiary, E.I. Johnson and testified that Ace owed that trust beneficiary at least $150,000.00. (A-702-A-703). So in an attempt to protect the trust beneficiary Lisa withdrew the money from the account.

The funds received by Ithaca College were trust assets. The failure to use that money to pay trust fund beneficiaries could lead to civil and criminal liability for Ace and Lisa. As such, Lisa had an obligation to make sure that no other entity or person encumbered that money before it could be paid to any rightful trust fund beneficiary. So in an attempt to protect the trust beneficiary Lisa Bellavigna withdrew the money from the account.

CONCLUSION

The Board violated Domenick Bellavigna and Bella Furniture Inc.'s due process rights by finding them personally liable under a theory for actual fraud, a theory which shifted the burden of proof to Respondents when that theory was not litigated below. Respondents Domenick Bellavigna and Bella Furniture Inc. had no notice of the actual fraud theory of liability and no notice they had the burden of proof. Thus the Board's decision regarding Domenick Bellavigna and Bella Furniture Inc. must be overturned for violation of due process.

The General Counsel failed to present substantial evidence showing that Robert Bellavigna participated in a scheme to defraud, failed to prove Robert diverted funds from Ace or Bella, failed to prove that Robert retained any of Ace's or Bellas' assets, failed to prove Robert had any roles whatsoever in controlling Bella Masonry's assets or finances, and failed to show that Robert Bellavigna was in control of Ace Masonry. The Board failed to present substantial evidence showing Robert Bellavigna had control of Ace or Bella and failed to present substantial evidence that Robert Bellavigna actively diverted corporate assets. Therefore, the Board's decision to pierce the corporate veil and hold Robert Bellavigna personally liable should be overturned.

Under Lien Law Article 3-A, Lisa Bellavigna could not use the money from one job to pay back pay owed to employees on a different job. The Board erred in not applying N.Y.S. Lien Law and thus erred in finding Lisa Bellavigna deliberately defrauded the Unions.

This Court should overturn the Board's decision finding Robert Bellavigna, Domenick Bellavigna and Bella Furniture Inc. personally liable and that Lisa Bellavigna deliberately defrauded the Unions.

Dated: March 20, 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)B) because the brief contains 5,963 words, excluding the parts of the brief exempted by F.R.A.P. 32(a)(7)(B)(iii). I hereby certify that this brief complies with the typeface requirements of F.R.A.P. 32(a)(5), the typestyle requirements of F.R.A.P. 32(a)(6), and the form requirements of F.R.A.P 32(c)(2), because the brief has been prepared using Microsoft Work 2013 in 14-point Times New Roman font.

Dated: March 20, 2017

s/Jason B. Bailey
Jason B. Bailey, Esq.

United States Court of Appeals

for the

SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD Petitioner v. ACE MASONRY INC., d/b/a ACE UNLIMITED, and BELLA MASONRY, LLC, a single member employer and alter egos, and LISA BELLAVIGNA, ROBERT BELLAVIGNA, AND HENRY BELLAVIGNA, DOMENICK BELLAVIGNA AND BELLA FURNITURE SOLUTIONS, INC. Respondents	)	Docket No. 16-2200 & 16-2705

CERTIFICATE OF SERVICE

The undersigned caused to be electronically filed and served the Respondent/Cross-Petitioner's Final Brief, with the Clerk of the Court for the United State Court of Appeals for the Second Circuit by using the Appellate CMECT system which was electronically transmitted for service upon:

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